STATE OF MICHIGAN

IN THE SUPREME COURT

** Appeal from the Michigan Court of Appeals **
Holbrook, Jr., P.J.; Saad, JJ., Talbot, JJ.

DANIEL ADAIR, a Taxpayer of the FITZGERALD PUBLIC SCHOOLS, and FITZGERALD PUBLIC SCHOOLS, a Michigan municipal corporation, *et al*,

Plaintiffs-Appellants

Docket No. 121536

vs.

Court of Appeals
Case No. 230858

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION, DEPARTMENT OF MANAGEMENT AND BUDGET, and MARK A. MURRAY, Treasurer of the State of Michigan,

Defendants-Appellees.

AMICUS CURIAE BRIEF OF THE MICHIGAN EDUCATION ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

James A. White (P22252)
Kathleen Corkin Boyle (P27671)
Timothy J. Dlugos (P57179)
WHITE, SCHNEIDER, YOUNG & CHIODINI, P.C.
Attorneys for Amicus Curiae the Michigan Education Association
2300 Jolly Oak Road
Okemos, MI 48864
(517) 349-7744

STATE OF MICHIGAN
IN THE SUPREME COURT
** Appeal from the Michigan Court of Appeals **

DANIEL ADAIR, a Taxpayer of the FITZGERALD PUBLIC SCHOOLS, and FITZGERALD PUBLIC SCHOOLS, a Michigan municipal corporation, *et al*,

Plaintiffs-Appellants

Docket No. 121536

vs.

STATE OF MICHIGAN, DEPARTMENT OF EDUCATION, DEPARTMENT OF MANAGEMENT AND BUDGET, and MARK A. MURRAY, Treasurer of the State of Michigan,

Defendants-Appellees.

Court of Appeals
Case No. 230858

Dennis R. Pollard (P18981)
Richard E. Kroopnick (P25381)
POLLARD, ALBERTSON, NYOVICH & HIGDON, P.C.
Attorneys for Plaintiffs-Appellants
38505 North Woodward Avenue, Suite 2300
Bloomfield Hills, MI 48304-2966
(248) 258-2850

Jane O. Wilensky (P30402)
Edith C. Harsh (P32675)
Assistant Attorneys General
Attorneys for Defendants-Appellees
Education Division
P.O. Box 30212
Lansing, MI 48909
(517) 373-1116

James A. White (P22252)
Kathleen Corkin Boyle (P27671)
Timothy J. Dlugos (P57179)
WHITE, SCHNEIDER, YOUNG & CHIODINI, P.C.
Attorneys for Amicus Curiae
The Michigan Education Association
2300 Jolly Oak Road
Okemos, MI 48864-4597
(517) 349-7744

AMICUS CURIAE BRIEF OF THE MICHIGAN EDUCATION ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

CASES: **PAGE**

STATUTES: **PAGE**

CONSTITUTIONAL AND OTHER AUTHORITY:

STATEMENT OF QUESTIONS INVOLVED

The Court's Order of December 18, 2002, granting Plaintiffs-Appellants' Application for Leave to Appeal, expressly limited the issues on appeal to the following:

I. **WHETHER *RES JUDICATA* BARS THE CLAIMS OF THOSE PLAINTIFFS-APPELLANTS THAT WERE ALSO PLAINTIFFS IN DURANT V STATE OF MICHIGAN, 456 MICH 175 (1997) [DURANT I]?**

The Court of Appeals answered "Yes."

Plaintiffs-Appellants contend the answer is "No."

Defendants-Appellees contend the answer is "Yes."

Amicus Curie contends the answer is "No."

II. **WHETHER THE CLAIMS OF THOSE PLAINTIFFS-APPELLANTS THAT WERE NOT PARTIES TO DURANT II ARE BARRED BECAUSE THE CURRENT PLAINTIFF-APPELLANT SCHOOL DISTRICTS RELEASED OR WAIVED THEIR CURRENT CLAIMS BY ADOPTING RESOLUTIONS THAT CONFORM TO MCL 388.1611f(8)?**

The Court of Appeals answered "Yes."

Plaintiffs-Appellants contend the answer is "No."

Defendants-Appellees contend the answer is "Yes."

Amicus Curie contends the answer is "No."

III. **WHETHER THE COURT OF APPEALS ERRED BY GRANTING SUMMARY DISPOSITION TO DEFENDANTS-APPELLEES ON THE RECORD KEEPING CLAIM THAT THE COURT DETERMINED WAS NOT BARRED BY EITHER *RES JUDICATA* OR RELEASE?**

The Court of Appeals answered "No."

Plaintiffs-Appellants contend the answer is "Yes."

Defendants-Appellees contend the answer is "No."

Amicus Curie contends the answer is "Yes."

STATEMENT OF FACTS

Amicus Curiae, the Michigan Education Association, accepts as true the Statement of Facts set forth in the main Brief on Appeal filed herein by Plaintiffs-Appellants.

ARGUMENT

I. PREFACE.

This lawsuit was commenced by 463 school districts and at least one taxpayer from each of those districts. It is an original action to enforce the second sentence of art 9, §29 of Mich Const 1963. Art 9, §§25-34 are also known as the Headlee Amendment. Plaintiffs-Appellants contend the State of Michigan, including the Michigan Legislature, Department of Education, and the Governor, over a period of several years, imposed numerous new activities and services or increased the level of specific activities and services on Plaintiff-Appellant School Districts without appropriating and dispensing funds to pay for the necessary costs increase incurred by the School Districts for those increases in violation of the second sentence of art 9, §29 of Mich Const 1963. Art 9, §29 of Mich Const 1963 states:

> The state is hereby prohibited from reducing the state financed portion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by the existing law shall not be required by the Legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any

necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to art VI, §18.[1]

In November 2000, Plaintiffs-Appellants commenced the present action in the Court of Appeals[2] seeking a declaratory judgment stating that Defendants-Appellees' actions in failing to properly fund specific new activities and services and increases in the level of existing activities and service is violative of the POUM clause of the Michigan Constitution.

Defendants-Appellees filed a Motion for Summary Disposition, briefs were submitted by both parties, and the Court of Appeals heard oral argument. The panel hearing the case consisted of the Honorable Donald E. Holbrook, Jr., the Honorable Henry W. Saad, and the Honorable Michael J. Talbot. The Court of Appeals issued an Opinion dated April 23, 2002, authored by Judge Talbot and concurred in by Judge Holbrook, dismissing Plaintiff-Appellants' Complaint, with prejudice. Judge Saad filed a dissenting Opinion, stating the dismissal of Plaintiffs-Appellants' Complaint was "premature" because of certain factual issues he believed had to be addressed by a special master appointed by the Court of Appeals. The Court of Appeals' Opinion of April 23, 2002, is the subject of this appeal.

---

[1]The first sentence of art 9, §29 is commonly referred to as the "Maintenance-of-Support Clause" ["MOS clause"]. The second sentence is commonly referred to as the Prohibition-of-Unfunded-Mandates Clause ["POUM clause"].

[2]Art 9, §32 of Mich Const 1963 gives Plaintiffs-Appellants ". . . standing to bring suit in the Michigan state Court of Appeals to enforce the provisions of §§25-31, inclusive, of this article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit."

In an Order dated December 18, 2002, this Court granted Plaintiffs-Appellants' Application for Leave to Appeal regarding the three issues which are set forth in the Statement of Issues Involved in this Brief. The Court limited the issues to be decided on appeal to the three questions set forth in the Statement of Issues Involved section of this Brief. The Amicus Curiae will address issues I and II. It has nothing to add to Plaintiffs-Appellants' arguments regarding issue III other than to indicate its agreement with the arguments presented on that issue by Plaintiffs-Appellants. For the reasons set forth herein, Amicus Curiae, the Michigan Education Association, requests this Court to (1) reverse the Court of Appeals' Opinion of April 23, 2002 in its entirety, (2) render a declaratory judgment stating, *inter alia*, that Defendants-Appellees' creation of new activities and services and increases in the level of previously-existing activities and services may be a violation of art 9, §29 of Mich Const 1963, and (3) remand this case to the Court of Appeals with the directive to appoint a special master and, thereafter, issue a declaratory judgment regarding Plaintiffs-Appellants' claims which is in accordance with this Court's pronouncements herein.

II. THE CLAIMS OF THOSE PLAINTIFFS THAT WERE ALSO PLAINTIFFS IN DURANT V STATE OF MICHIGAN, 456 MICH 175 (1997) ARE NOT BARRED BY *RES JUDICATA*.

A number of Plaintiffs-Appellants in this action were also plaintiffs in Durant v State of Michigan, 456 Mich 175; 566 NW2d 272 (1997) (hereinafter referred to as"Durant I"). Durant I challenged the reduction of the State financed proportion of the necessary costs of certain activities and services required of school districts by state law. Plaintiffs-Appellants in this action seek a declaratory ruling that the State, in the

2000 PA 297 amendments to the School Aid Act, has failed to meet its funding responsibilities under art 9, §29 of Mich Const 1963 by failing to pay Michigan school districts for the necessary costs of providing those activities and services that either were first required by state law after 1978 or where the level of activity or service was increased. Defendants-Appellees argue Plaintiffs-Appellants' claim regarding those amendments to the School Aid Act are barred by *res judicata* because of Durant I. The Michigan Court of Appeals accepted Defendants-Appellees' argument and dismissed Plaintiffs-Appellants' Complaint, with prejudice. Adair v State of Michigan, 250 Mich App 691; 651 NW2d 393 (2002).

The facts in this case do not present a compelling basis upon which to apply the concept of *res judicata*, and the application of *res judicata* is even more questionable where, as here, the parties are suing to vindicate express constitutional rights. Michigan courts have often stated that the doctrine of *res judicata* is not immutable. It reflects a policy of law which seeks to find an end to litigation; however, it is only a policy, not an absolute rule, and it need not be and has not been applied rigidly without regard to disparate factual situations. *See* In Re Raseman Estate, 18 Mich App 91; 170 NW2d 503 (1969) and In Re Turner, 108 Mich App 583; 310 NW2d 802 (1981).

In Michigan, for the doctrine of *res judicata* to apply as a bar to the maintenance of a subsequent action, it must appear that the prior action was rendered on the merits, on the same matter in issue, and between the same parties or their privies. Mazzola v Vineyard Homes, Inc, 54 Mich App 608, 613; 221 NW2d 406 (1974), citing Zak v Gray, 324 Mich 522; 37 NW2d 550 (1949), Hewett Grocery Co v Biddle Purchasing Co,

289 Mich 225; 286 NW2d 221 (1939), and Gomber v Dutch Maid Dairy, 42 Mich App 505; 202 NW2d 566 (1972), *lv den*, 389 Mich 752 (1972).

Res judicata is a common law doctrine in this State, and the parameters of *res judicata* have been established by judicial decision, not by statute or court rule. In Rose v Rose, 10 Mich App 233, 236-7; 157 NW2d 16 (1968), the Court of Appeals quoted 30A Am Jur, Judgments, Section 365, pp 407-408, to describe the test for whether or not two different cases addressed the same issue:

> In the application of the doctrine of res judicata, if it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.

Plaintiffs-Appellants instituted this action under the provisions of the Headlee Amendment to the Michigan Constitution. The Headlee Amendment is the result of a voter initiative petition that was ratified by the electorate on November 7, 1978. Through the Headlee Amendment, art 9, §§25 through 34 of Mich Const 1963, Michigan voters imposed specific limitations on taxation in the State of Michigan.

Art 9, §26 is a limitation on the taxes imposed by the state Legislature. Art 9, §29, prohibits the State of Michigan from shifting state expenses to local governments. Both this Court and the Court of Appeals have held that there are two specific and distinct prohibitions set forth in §29 of the Headlee Amendment. First, §29 prohibits the State from *reducing* the state financed proportion of an existing program or

service required by the State. This prohibition is set forth in the first sentence of art 9, §29 and it is referred to as the MOS clause. The second prohibition contained in §29 bars the State from either imposing a *new* activity on a local unit of government or *increasing* the level of activity or service beyond that which existed in 1978, unless there is an appropriation to pay for the increase. This is the POUM clause. In Judicial Attorneys Ass'n v State of Michigan, 460 Mich 590, 597-98; 597 NW2d 113 (1999), this Court commented on the difference between the two prohibitions:

> [Section] 29 distinguishes between the continuation of an activity mandated in 1978 and the imposition of a new activity or increase in the level of an activity. Section 29 prohibits the state from reducing its proportion of the necessary costs of existing activities while it requires the state to pay the increased necessary costs in full when it mandates new activities or mandates activities at an increased level. (Emphasis in original.)

The Court of Appeals had previously recognized this distinction in Wayne County Chief Executive v Governor, 230 Mich App 258, 264-65; 583 NW2d 512 (1998), noting that the section was intended to "encompass two different injuries" and that claims brought pursuant to §29 "arise from situations involving one of two harms."

To hold that this case is barred by *res judicata* as a result of Durant I ignores the distinction between the two prohibitions included in §29. As noted previously, Durant I challenged the State's appropriation for specific mandated services that had received state funding in the years prior to 1979. That was an action filed under the MOS clause. The present suit, on the other hand, seeks a declaratory judgment that the State has failed to fund a new activity or service or an increase in the level of an activity or service beyond

that required by existing law at the time the Headlee Amendment was ratified in 1978. This is an action alleging violation of the POUM clause.

With the electorate's approval of the Headlee Amendment, the people of this State imposed upon the Michigan Legislature comprehensive constitutional limitations on taxation and spending and further established a constitutionally-guaranteed method of enforcing those limitations. Art 9, §32 of Mich Const 1963 empowers any individual tax payer to file suit to challenge a violation of the Headlee limitations on taxation and spending. The Opinion of the Court of Appeals in this case countenanced a flagrant violation of the POUM clause when it held that the Supreme Court's decision in Durant I, holding the MOS clause had been violated, forever barred the plaintiffs from enforcing their rights under the POUM clause.

Because the obligation imposed by the second sentence of art 9, §29 is distinct from the obligation imposed by the first sentence, a declaratory judgment finding a violation of the POUM clause would rest on different facts then those which would sustain a determination against the State regarding the MOS clause. There is a clear difference between the proofs necessary to make a determination as to whether there has been a *reduction* of the state proportion of the costs of a pre-1978 mandated service and the proofs necessary to establish that a *new*, unfunded service was required of local governments or that there was an unfunded *increase* in the level of service imposed on local governments after the adoption of Headlee in 1978.

This case challenges Defendants-Appellees' failure to comply with the funding requirements of the POUM clause in 2000 PA 297, an appropriation act adopted in July 2000. Plaintiff-Appellant taxpayers seek a declaratory judgment that in the

appropriation act, the State failed to provide funding for: (1) new or increased special education activities and services (Count I), (2) the cost of increased minimum hours of pupil instruction during the 2000-01 school year, the 2001-02 school year, the 2002-03 school year, the 2003-04 school year, the 2004-05 school year, the 2005-06 school year, and the 2006-07 school year (Count II), and (3) the cost of other specific additional activities and services that are required of Michigan school districts by state law enacted subsequent to 1978 (Count III).

All of these allegations address requirements imposed by the State on Michigan school districts for the 1999-2000 school year and subsequent school years, and for which the State of Michigan has failed to provide funding as required by art 9, §29 of Mich Const 1963. The facts necessary to prove the allegations set forth in Counts I, II, and III of the Second Amended Complaint were not before the special master or the Court of Appeals in Durant I, nor could they have been, because the state appropriations to school districts for those school years had yet to be made. The facts or evidence that will sustain the allegations in Count I, II, and III of Second Amended Complaint in this matter are therefore separate and distinct from the proofs that the Court of Appeals and this Court held were sufficient to sustain the judgment issued in Durant I.

Furthermore, the Amicus Curiae respectfully submits that in this case the Court must consider that what is sought is a declaratory judgment regarding whether or not the Legislature has violated the Michigan Constitution. To hold that *res judicata* bars Plaintiff-Appellant taxpayers from seeking a declaratory judgment regarding any activity or service that may have been initiated or increased prior to 1997, no matter what increase may have been imposed in the fiscal years at issue in this case, would give

Defendants-Appellees license to engage in the continuing violation of the Michigan Constitution and of the constitutional rights of the taxpayers of this State, who initiated and approved the Headlee Amendment in 1978.

III. NO PLAINTIFF-APPELLANT IS PREVENTED FROM BRINGING AN ACTION TO ENFORCE THEIR RIGHTS UNDER THE SECOND SENTENCE OF ART 9, §29 OF MICH CONST 1963 BECAUSE THEY SIGNED A RELEASE WHICH CONFORMS TO MCL 388.1611f(8).

Judge Talbot's Opinion of April 23, 2003, erroneously granted Defendants-Appellees' Motion for Summary Disposition against Plaintiffs-Appellants in the present action as to those school districts that had not been plaintiffs in Durant I, but executed statutory releases pursuant to MCL 388.1611f and as to the ". . . taxpayer Plaintiffs-Appellants who now represent them . . . ." This Court's Order of December 18, 2002, granting Plaintiffs-Appellants' Application for Leave to Appeal, sets forth the issues raised by the signing of the releases as follows:

> [W]hether the claims of those Plaintiffs who were not parties to Durant I are barred because the current Plaintiff School Districts released or waived their current claims by adopting resolutions that conformed to MCL 388.1611f(8).

The Court of Appeals' Opinion regarding this issue is fatally flawed and must be reversed.

It is significant that the statutory release in MCL 388.1611f(8) resulted directly from the Supreme Court's Opinion in Durant I. The Court stated:

> We affirm that portion of the Court of Appeals judgment that awards money damages, without interest, to Plaintiff School Districts for the full amount of the underfunding to each district during 1991-92, 1992-93, and 1993-94.
>
> We conclude that any award of damages should be distributed to the Plaintiff School Districts and apportioned to taxpayers within each district, if appropriate.

Durant I, *supra*, at 288-289. (Footnotes omitted.)

A couple of thoughts are important regarding the above-stated grant of money damages:

1. The award was for damages suffered by the plaintiff school districts and taxpayers due to the violation of their rights under the first sentence of art 9, §29 of Mich Const 1963. Plaintiffs-Appellants in the present action are seeking a declaratory judgment pursuant to their rights and the School Districts' responsibilities under the second sentence of art 9, §29 of Mich Const 1963.

2. At no time did the Supreme Court's Opinion in Durant I mention anything about money damages being awarded to the school districts that were not parties to Durant I.

3. At no time did the Supreme Court's Opinion in Durant I mention anything about the plaintiff school districts or anyone else signing a release of rights in any form. The granting of money and release were something gratuitously concocted by the Legislature to make the non-plaintiff school districts give up certain rights in order to receive money the Legislature was offering them under 1997 PA 142, for claims similar to those of the plaintiffs in Durant I.

A. The law of release.

Many of the general principles regarding the law of release set forth in the Court of Appeals' Opinion herein and asserted by Defendants-Appellees on appeal, standing by themselves, are not inaccurate. However, as will be demonstrated herein, those legal principles do not tell the whole story and are inapplicable to the facts of this case.

None of the cases relied upon by the Court of Appeals and Defendants-Appellees herein involved actions regarding the State's obligations under the Headlee Amendment. Most of the cases cited dealing with the doctrine of release involved situations where the litigants had previously arrived at a settlement of a contested claim. The party paying off the claim exacted a release and waiver of future liability to the

claimant, normally in the broadest possible terms. In that context, the cases cited by the Court of Appeals and Defendants-Appellees are accurate. But their analysis not only failed to take into account several time tested legal principles regarding the law of release, but also totally ignored the important fact that this case involves the obligation of the Legislature to fund public education in accordance with the express, affirmative mandates set forth in the Michigan Constitution.

Initially, one must review some legal principles regarding the law of release which the Court of Appeals and Defendants-Appellees overlooked.

Michigan courts have long recognized that a release covers only the claims intended by the parties to be released. *See* Harris v Lapeer Public Schools, 114 Mich App 107; 318 NW2d 830 (1982); Auto Owners Ins Co v Higby, 57 Mich App 604; 226 NW2d 580 (1975); Denton v Utley, 350 Mich 332; 86 NW2d 537 (1957); and Theisen v Kroger, 107 Mich App 580; 309 NW2d 676 (1981).

In Denton, *supra*, the Supreme Court, in refusing to uphold the efficacy of a release, stated that to be valid a release must be fair and knowingly made. Our courts will go beyond the broad language of a release to determine the fairness of a release and the intent of the parties in executing it. In Theisen, *supra*, the Court of Appeals, when discussing the fairness requirement, stated a release would be invalid if:

> (1) The releasor was dazed, suffering from shock or under the influence of drugs; (2) there was misrepresentation as to the nature of the instrument; or (3) there was other fraudulent or overreaching conduct.

Theisen, *supra*, at 582-583. (Emphasis added.)

What were the circumstances and in what context did the non-plaintiffs in Durant I that became Plaintiffs-Appellants herein sign the releases exacted by the Legislature pursuant to MCL 388.1611f? It was reiterated numerous times in MCL 388.1611f, g, and h that the money being appropriated to the school districts that were not plaintiffs in Durant I, was connected to the Supreme Court's decision in Durant I. But for the Supreme Court's decision therein the Legislature would not have been appropriating and sending to the non-plaintiff school districts the money they were receiving pursuant to MCL 388.1611f-h.

What did the Michigan Supreme Court state in Durant I affecting this issue? The Court affirmed, once again, after approximately 18 years of litigation, that the defendants violated the school districts' rights under the Headlee Amendment. The violations existed from the inception of the litigation. However, the Court opined that because the State defendants had not known definitely until after the Court of Appeals' decision therein in 1990 which activities must be funded, it would not assess money damages against the State defendants until after the Court of Appeals' 1990 decision which clarified precisely what they had been underfunding. The Supreme Court's decision in Durant I ordered the State to reimburse the plaintiff school districts for the 1991-92, 1992-93, and 1993-94 school years. It assessed those damages because of what the Court termed "[t]he prolonged 'recalcitrance' of the State in shirking its obligations to fund state-mandated services . . ." and, because the declaratory relief alone could not cure the affects of the State's prolonged underfunding. (*See* Durant I, at 285.)

Nowhere in the Durant I decision did the Supreme Court mention anything about the plaintiffs signing releases to secure the money damages to which they were

entitled from defendants, or that the Legislature must appropriate money to pay the school districts that were not plaintiffs therein. However, in the statute appropriating the money to pay the damages ordered by the Supreme Court in Durant I, (*see* 1997 PA 142), the Legislature, gratuitously, decided to make additional payments to the school districts that were not plaintiffs in that case and to require the non-plaintiff recipients to release the State for all future claims similar to those the plaintiff school districts had or may have in the future. The entire release is reproduced in whole in Exhibit A to this Brief. It is clear from a reading of that release that it was the intent of the Legislature to treat the plaintiffs receiving the money under Durant I and the school districts receiving money that were not plaintiffs in Durant I in the same fashion. It is in that context which the Legislature provided in the release in subparagraph 8 as follows:

> Whereas, the Board of _____ (name of school district or intermediate school district) desires to settle and compromise, in their entirety, any claim or claims that the district (or intermediate district) has or had for violation of Section 29 of Article IX of the State Constitution of 1963, which claim or claims are or were similar to the claims asserted by the plaintiffs in the consolidated cases known as Durant v State of Michigan, Michigan supreme court docket no. 104458-104492. (Emphasis added.)

Placed in the proper context, it is clear that the language regarding the release of claims was inserted to treat the plaintiff school districts in Durant I and the non-plaintiff school districts similarly. The language regarding "similar claims" had nothing to do, as the Court of Appeals' Opinion held, with the similarity of claims between those arising under the first sentence of art 9, §29 of Mich Const 1963 and the second sentence of that provision. The Supreme Court in Durant I never dealt with claims under the second sentence of art 9, §29. No such issues had been litigated. Accordingly, on the face of the section f(8)

release alone, the Legislature was not requiring the school districts to give up any rights other than what had been litigated in Durant I, *i.e.*, rights under the first clause [the MOS clause] of art 9, §29 of Mich Const 1963.

In Brooklyn Savings Bank v O'Neil, 65 S Ct 895; 324 US 697; 89 L Ed 1296, the United States Supreme Court stated that a statutory right, conferred on a private party, but affecting the public interest, may not be released, if such release contravenes the statute's policy. (*See also*, 76 CJS release §20.) In Brooklyn Savings Bank, *supra*, the United States Supreme Court was dealing with the validity of a release in which the releasor gave up some of his rights under the Fair Labor Standards Act. In refusing to enforce the release, the United States Supreme Court stated, *inter alia*:

> It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such a waiver or release contravenes the statutory policy.

Brooklyn Savings Bank, *supra*, at 1307.

For additional cases wherein releases were held to be invalid as against public policy, *see* MacDonald v Musick, 425 F2d 373 (9th Cir, 1970) and Dickson v District of Columbia, 394 F2d 966 (DC Cir, 1968).

If statutory rights affecting public policy cannot be released or waived, Plaintiffs-Appellants' constitutional rights under the Headlee Amendment certainly cannot be released or waived. What could be more sacred public policy than an amendment to the Michigan Constitution passed by the people in a popular referendum?

B. The Legislature cannot abdicate its constitutional responsibilities by requiring a release.

The Amicus Curiae further contends the Court of Appeals' analysis of the releases signed by school districts in 1997 is flawed because the Court failed to recognize the Legislature cannot, under any circumstances, avoid its solemn constitutional duties to educate Michigan's children and to follow the funding mandates in the Headlee Amendment. The Legislature cannot void the Michigan Constitution through the expedient of requiring local school districts to sign a release or waiver when receiving money the Legislature has appropriated. Further, neither individual citizens nor school boards have the power to subvert the clear, express mandates set forth in the Constitution. If one follows the Court of Appeals' Opinion and Defendants-Appellees' argument regarding the release issue to its logical conclusion, the Legislature could simply attach to every appropriation bill a release which local units of government must sign each year before they receive money from legislative appropriations, under which the local unit of government releases the State from any further liability under the Headlee Amendment. Within a year or so, every unit of local government would have given up their rights to enforce the Headlee Amendment. To state such a scenario demonstrates the absurdity of the Court of Appeals' conclusions herein that the releases signed by school districts in 1997 somehow absolved the Legislature from its constitutional obligations to finance public education in accordance with the express mandates set forth in art 9, §29 of Mich Const 1963.

In this regard, it is important to note that each year there is a new group of children starting school. There are constantly new taxpayers in each school district, and

the composition of the school boards change regularly. It is safe to assume that a large number of the students in Michigan schools in 1997 are no longer in the school districts which signed these releases. But, the Legislature's obligation to educate Michigan's children remains the same, and its obligation to finance education within the confines of express constitutional directives remains unabated. Those solemn obligations cannot be thwarted by a release signed by school districts in order to receive money the Legislature has appropriated. School districts in 1997 could not release or waive today's students' rights to have the Legislature follow the Constitution when financing their education.

The Amicus Curiae asks this Court to reject Defendants-Appellees' analysis of the releases signed by the school districts in 1997 and asks, instead, "What is the obligation of the Legislature to abide by a clear, unequivocal requirement set forth in art 9, §29 of Mich Const 1963"? Can the Legislature absolve itself of the clear constitutional requirements set forth in art 9, §29? Clearly they cannot. When the issues connected with the signing of releases in 1997 are viewed in the proper context, this Court must quickly conclude that the Legislature has no right to ignore its affirmative obligations under the Constitution and neither school boards nor private citizens have the power to release or waive the Legislature's constitutional obligations.

SUMMARY AND CONCLUSION

The Court of Appeals' reliance on the doctrines of *res judicata* and release as a basis for dismissing Plaintiffs-Appellants' Second Amended Complaint herein was entirely misplaced. Durant I dealt only with the failure of the State to properly fund specific portions of public education under the Maintenance-of-Support Clause in art 9, §29 of Mich Const 1963. The present action is one for a declaratory judgment and deals with the

alleged failure of the State to properly fund new activities and services, and increases in the level of certain activities and services beyond that required when the Headlee Amendment was passed, in violation of the Prohibition-of-Unfunded-Mandates Clause in art 9, §29 of Mich Const 1963.

The present case presents entirely different issues based on vastly different facts than those presented in Durant I. Michigan courts look at the identity of facts between an initial and subsequent action when deciding whether to apply the doctrine of *res judicata*. From the standpoint of either the identity of facts or the identity of legal issues, this is not an appropriate case in which to apply *res judicata* on the basis of the Supreme Court's decision in Durant I.

The Court's reliance on the releases signed by Plaintiffs-Appellants herein, that were not plaintiffs in Durant I, is also misplaced. The releases signed pursuant to MCL 388.1611f(8) were not intended to divest the school districts of their rights to enforce the Legislature to abide by the express mandates set forth in the POUM clause of the Headlee Amendment. Even though the State and the Court of Appeals may contend that such was the legislative intent, it is clear the Legislature has no power to avoid its constitutional responsibilities so clearly set forth in art 9, §29 of Mich Const 1963.

In short, neither the Legislature, individual taxpayers, school districts, nor students have the right, even if they so desired, to "release" the Legislature from its responsibilities under the people's Constitution.

Accordingly, Amicus Curiae, the Michigan Education Association, respectfully requests that this Honorable Court:

1. Reverse the Court of Appeals' Opinion of April 23, 2002 in its entirety.

2. Render a declaratory judgment which clearly sets forth the funding obligations of the Legislature under the POUM clause of the Michigan Constitution.

3. Remand this case to the Court of Appeals for the appointment of a special master and, thereafter, issue a declaratory judgment regarding Plaintiffs-Appellants' specific claims in accordance with this Court's pronouncements herein.

Respectfully submitted,

WHITE, SCHNEIDER, YOUNG
& CHIODINI, P.C.
Attorneys for Amicus Curiae
the Michigan Education Association

Dated: February 12, 2003

By: James A. White

James A. White (P22252)
Kathleen Corkin Boyle (P27671)
Timothy J. Dlugos (P57179)

to the claims asserted by the plaintiffs in the consolidated cases known as Durant v State of Michigan. This section, any other provision of this act, and section 353e of the management and budget act, 1984 PA 431, MCL 18.1353e, shall not be construed to constitute an admission of liability to the districts or intermediate districts listed in section 11h or a waiver of any defense that is or would have been available to the state or its agencies, employees, or agents in any litigation or future litigation with a district or intermediate district.

(5) The entire amount of each payment under subsection (1) each fiscal year shall be paid on November 15 of the applicable fiscal year or on the next business day following that date.

(6) Funds paid to a district or intermediate district under this section shall be used only for textbooks, electronic instructional material, software, technology, infrastructure or infrastructure improvements, school buses, school security, training for technology, or to pay debt service on voter-approved bonds issued by the district or intermediate district before the effective date of this section. For intermediate districts only, funds paid under this section may also be used for other nonrecurring instructional expenditures including, but not limited to, nonrecurring instructional expenditures for vocational education, or for debt service for acquisition of technology for academic support services. Funds received by an intermediate district under this section may be used for projects conducted for the benefit of its constituent districts at the discretion of the intermediate board. To the extent payments under this section are used by a district or intermediate district to pay debt service on debt payable from millage revenues, and to the extent permitted by law, the district or intermediate district may make a corresponding reduction in the number of mills levied for that debt service.

(7) The appropriations under this section are from the money appropriated and transferred to the state school aid fund from the countercyclical budget and economic stabilization fund under section 353e(2) and (3) of the management and budget act, 1984 PA 431, MCL 18.1353e.

(8) The resolution to be adopted and submitted by a district or intermediate district under this section and section 11g shall read as follows:

"Whereas, the board of _____ (name of district or intermediate district) desires to settle and compromise, in their entirety, any claim or claims that the district (or intermediate district) has or had for violations of section 29 of article IX of the state constitution of 1963, which claim or claims are or were similar to the claims asserted by the plaintiffs in the consolidated cases known as Durant v State of Michigan, Michigan supreme court docket no. 104458-104492.

Whereas, the district (or intermediate district) agrees to settle and compromise these claims for the consideration described in sections 11f and 11g of the state school aid act of 1979, 1979 PA 94, MCL 388.1611f and 388.1611g, and in the amount specified for the district (or intermediate district) in section 11h of the state school aid act of 1979, 1979 PA 94, MCL 388.1611h.

Whereas, the board of _____ (name of district or intermediate district) is authorized to adopt this resolution.

Now, therefore, be it resolved as follows:

1. The board of _____ (name of district or intermediate district) waives any right or interest it may have in any claim or potential claim through September 30, 1997 relating to the amount of funding the district or intermediate district is, or may have been, entitled to receive under the state school aid act of 1979, 1979 PA 94, MCL 388.1601 to 388.1772, or any other source of state funding, by reason of the application of section 29 of article IX of the state constitution of 1963, which claims or potential claims are or were similar to the claims asserted by the plaintiffs in the consolidated cases known as Durant v State of Michigan, Michigan supreme court docket no. 104458-104492.

2. The board of _____ (name of district or intermediate district) directs its secretary to submit a certified copy of this resolution to the state treasurer no later than 5 p.m. eastern standard time on March 2, 1998, and agrees that it will not take any action to amend or rescind this resolution.

3. The board of _____ (name of district or intermediate district) expressly agrees and understands that, if it takes any action to amend or rescind this resolution, the state, its agencies, employees, and agents shall have available to them any privilege, immunity, and/or defense that would otherwise have been available had the claims or potential claims been actually litigated in any forum.

4. This resolution is contingent on continued payments by the state each fiscal year as determined under sections 11f and 11g of the state school aid act of 1979, 1979 PA 94, MCL 388.1611f and 388.1611g. However, this resolution shall be an irrevocable waiver of any claim to amounts actually received by the school district or intermediate school district under sections 11f and 11g of the state school aid act of 1979.".

(9) In order for the democratic process to inform and shape distribution of the money paid under this section and section 11g, as referenced in the Michigan supreme court's July 31, 1997 opinion in the consolidated cases known as Durant v State of Michigan, before June 30, 1998, the board of a district or intermediate district that qualifies to receive funds under this section or section 11g shall hold a public hearing of the board to discuss how the board will use those funds and, if applicable, any proceeds from bonds that may be issued under section 11i. The board may hold this hearing